Development & Commercial Bank Bhd v Tan Ong Hwa & Anor

HIGH COURT (JOHORE BAHRU) — APPLICATION IN CIVIL SUIT NO 22-74 OF 1991
JAMES FOONG J
28 OCTOBER 1992

Civil Procedure *— Appeal — Notice of — Extention of time for serving notice of appeal, application for — Guiding principles — 'Some material' or 'instances' which warrant court's discretion — Rules of the High Court 1980 O 56 r 1*

This was an application by the first defendant to file the notice of appeal out of time against the decision of the senior assistant registrar made on 10 August 1992 granting summary judgment against her. The first defendant was seven days late in filing the notice of appeal. Her solicitor's affidavit deposed that instructions for appeal were only obtained on 18 August 1992. But the first defendant in her affidavit deposed that her solicitors had proceeded to file an appeal on 15 August 1992. There is evidence from the first defendant's solicitor that on the very next day after the decision of the senior assistant registrar, a letter was sent to the first defendant informing her of the decision and requesting instructions. This letter did not reach her until 18 August 1992. On this very same day, communication between the first defendant and her solicitors was established by telephone and without further delay, an application for enlargement of time was filed. From the facts, the attempt to file the notice of appeal was only made on 22 August 1992.

Held, allowing the first defendant's application:

(1) The main guiding principles for the court to consider in allowing extension of time for appeal are the length of the delay, the reasons for the delay, the chances of the appeal succeeding if time for appealing is extended, and the degree of prejudice to the respondent if the application is granted.

(2) The delay of seven days was not unreasonable or unjustifiable, after taking into consideration that part of the delay was due to the inefficiency of the postal service. The first defendant had not delayed in filing this application for enlargement of time.

(3) In respect of the contradiction between the affidavit of the first defendant and that of her solicitor, the learned judge accepted the explanation of the first defendant's counsel, that this was a clerical mistake as all facts in the affidavits filed in support of this application indicate that no notice of appeal was filed on 15 August 1992. As the solicitors only attempted to file a notice of appeal on 22 August 1992, there could not have been any notice of appeal filed on 15 August 1992.

(4) The judgment is of a summary nature. The sum involved is over $\$^1/_2$m together with interest and the plaintiff's claim is based on

two guarantees executed by the first defendant, the consideration of which was for financial facilities granted to a housing development company. There were allegations by the first defendant of misrepresentations and wrongful allocation of funds by the plaintiffs. It is reasonable in the circumstances, that the first defendant may succeed in her appeal if time for appealing is extended.

(5) The plaintiffs are not substantially prejudiced as their application was for summary judgment and if their case is comprehensive enough they would still succeed on an appeal to the judge-in-chambers. If this application is granted the appeal had to be heard in just a few months. The plaintiffs had also not taken any steps to enforce judgment since the learned senior assistant registrar's order. Accordingly, the learned judge granted an enlargement of time of two days.

[Bahasa Malaysia summary

Ini adalah suatu permohonan daripada defendan pertama untuk memfailkan notis rayuan di luar had masa, terhadap keputusan penolong kanan pendaftar yang dibuat pada 10 Ogos 1992, membenarkan penghakiman terus terhadapnya. Defendan pertama lewat memfailkan notis rayuan selama tujuh hari. Afidavit peguamcara beliau mendepos bahawa arahan untuk rayuan telah hanya diperoleh pada 18 Ogos 1992. Tetapi defendan pertama, dalam afidavitnya, mendepos bahawa peguamcaranya telahpun memfailkan notis rayuan pada 15 Ogos 1992. Terdapat bukti daripada peguamcara defendan pertama, bahawa pada hari selepas keputusan penolong kanan pendaftar itu, sepucuk surat telah dihantar kepada defendan pertama memberitahunya tentang keputusan itu dan memintanya memberi arahan. Surat itu tidak diterima oleh defendan pertama sehingga 18 Ogos 1992. Pada hari yang sama, komunikasi di antara defendan pertama dan peguamcaranya telah dibuat melalui telefon dan dengan tidak berlengah lagi, suatu permohonan telah difailkan untuk melanjutkan tempoh rayuan. Dari fakta-fakta yang ada, percubaan untuk memfailkan notis rayuan hanya dibuat pada 22 Ogos 1992.

Diputuskan, membenarkan permohonan defendan pertama:

(1) Prinsip-prinsip utama yang menjadi pedoman bagi mahkamah apabila membuat keputusan membenarkan pelanjutan tempoh rayuan adalah tempoh masa kelewatan, sebab-sebab kelewatan, kemungkinan rayuan itu berjaya jika masa untuk rayuan dilanjutkan, dan sejauh mana penentang akan dimudaratkan jika permohonan dibenarkan.

(2) Kelewatan selama tujuh hari itu bukanlah tidak munasabah atau tidak dapat dijustifikasikan, memandangkan kelewatan itu disebabkan, sebahagiannya, oleh perkhidmatan pos yang tidak cekap. Defendan pertama tidak lewat memfailkan permohonan ini untuk pelanjutan tempoh rayuan.

(3) Memandangkan penyangkalan di antara afidavit defendan pertama dan afidavit peguamcaranya, hakim yang arif telah menerima

penerangan peguamcara defendan pertama, bahawa ianya adalah kesilapan perkeranian, kerana semua fakta-fakta di dalam afidavit-afidavit yang difailkan sebagai menyokong permohonan itu menunjukkan bahawa tiada notis rayuan difailkan pada 15 Ogos 1992. Oleh kerana peguamcara hanya cuba memfailkan suatu notis rayuan pada 22 Ogos 1992, tidak mungkin terdapat sebarang notis rayuan yang difailkan pada 15 Ogos 1992.

(4) Penghakiman itu adalah dibuat secara terus. Jumlah yang terlibat adalah lebih daripada $\$^1/_2$ juta, termasuk faedah dan tuntutan plaintif adalah berdasarkan dua jaminan yang telah dilaksanakan oleh defendan pertama, balasannya adalah kemudahan kewangan yang diberikan kepada sebuah syarikat pembangunan perumahan. Terdapat tuduhan oleh defendan pertama tentang salah nyataan dan penguntukan wang yang salah oleh plaintif. Adalah munasabah, memandangkan keadaan sedemikian, bahawa defendan pertama mungkin berjaya dalam rayuannya, jika masa untuk rayuan itu dilanjutkan.

(5) Plaintif tidak dimudaratkan secara substansial kerana permohonan mereka adalah untuk penghakiman terus dan jika kes mereka cukup komprehensif, mereka masih akan berjaya dalam rayuan kepada hakim dalam kamar. Jika permohonan itu diizinkan, rayuan itu akan didengar dalam tempoh beberapa bulan. Plaintif juga belum mengambil langkah untuk menguatkuasakan penghakiman semenjak perintah penolong kanan pendaftar. Dengan itu, hakim yang arif telah melanjutkan tempoh rayuan selama dua hari.]

Notes

For cases on extension of time for serving notice of appeal, see 2 *Mallal's Digest* (1990 Ed) paras 392–398.

Cases referred to

1 *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 (folld)
2 *Tan Chai Heng v Yeo Seng Choon* [1981] 1 MLJ 271 (folld)
3 *Cheviot Industries (M) Sdn Bhd v Lean Hup Bros Co* [1989] 1 CLJ 909 (folld)
4 *Palata Investments Ltd & Ors v Burt & Sinfield Ltd & Ors* [1985] 2 All ER 517; [1985] 1 WLR 942 (folld)
5 *Pearson v Chen Chien Wen Edwin* [1991] 3 MLJ 208 (folld)
6 *Hau Khee Wee & Anor v Chua Kian Tong & Anor* [1987] 2 MLJ 146 (folld)

Legislation referred to

Rules of the High Court 1980 O 14 and O 56 r 1

Wong Kim Fatt and Soong Shau Tshung (*Gulam & Wong*) for the applicant/first defendant.

S Sothi (*Brockett & Cho*) for the respondent/plaintiff.

James Foong J: This is an application by the first defendant for enlargement of time to file notice of appeal against the decision of the senior

assistant registrar in allowing an O 14 application of the plaintiffs on 10 August 1992.

Under O 56 r 1(3) of the Rules of the High Court 1980, the notice of appeal must be filed within five days after the date of decision. The first defendant is seven days late in filing the said notice of appeal.

The first defendant's solicitor, Mr Tho, deposed on affidavit that the delay in filing the notice of appeal was due to the lateness in obtaining instructions from the first defendant to appeal against the decision of the senior assistant registrar. He only obtained the first defendant's decision to proceed with the appeal on 18 August 1992. Further, in Mr Tho's said affidavit, he asserted that there are merits in the first defendant's appeal.

The learned counsel for the plaintiff objected to this application. One pertinent point forwarded was para 3 of an affidavit affirmed by the first defendant on 22 August 1992 filed in support of an application for stay of execution on the decision of the senior assistant registrar on 10 August 1992. This affidavit was annexed as an exhibit to Mr Tho's affidavit. In para 3 of the first defendant's said affidavit she asserted that she had instructed her solicitors to appeal against the decision of the senior assistant registrar and this was carried out by them on 15 August 1992. This obviously is a contradiction on facts, when on one hand the first defendant's solicitors alleged that they did not receive any instructions from the first defendant until 18 August 1992 whilst, the first defendant asserted that her solicitors had already proceeded to file an appeal on 15 August 1992. If the appeal was filed on 15 August 1992, it is well within the five days period for appeal. However, from the facts of this case, attempt to file notice of appeal was only made on 22 August 1992.

As submitted to me by the learned plaintiff's counsel, Miss S Sothi, the long line of decided authorities has laid down guiding principles for allowing extension of time for appeal. In order for this application to be allowed, the first defendant must have 'some material upon which the court can exercise its discretion' (see the case of *Ratnam v Cumarasamy & Anor*[1]) and/or 'instances which warrant the exercise of the court's discretion in favour of the application' (*Tan Chai Heng v Yeo Seng Choon*[2]).

Instances where it was an oversight or mistake on the part of the solicitors to advise their client of the time limited to file notice of appeal, were dismissed by the courts as not falling within 'some material' or 'instances' which warrant the court's discretion in favour of the application. (See the case of *Cheviot Industries (M) Sdn Bhd v Lean Hup Bros Co.*[3])

I find that only in an extreme circumstance as in the case of *Palata Investments Ltd & Ors v Burt & Sinfield Ltd & Ors*,[4] that a mistake of the legal adviser arising from the misreading of the complex practice direction which was then recently implemented in the courts in England that the courts allow enlargement of time for appeal.

The aforesaid cases only relate to isolated situations, but what are the main guiding principles for this court to consider whether to grant or refuse an application of this nature? In this respect, I find the principles enunciated in the case of *Pearson v Chen Chien Wen Edwin*,[5] a Court of Appeal decision of Singapore adopting the views of Chan Sek Keong J in *Hau Khee Wee & Anor v Chua Kian Tong & Anor*,[6] to be sound for adoption in deciding these type of cases. The factors are as follows:

(a) the length of the delay;
(b) the reasons for the delay;
(c) the chances of the appeal succeeding if time for appealing is extended; and
(d) the degree of prejudice to the respondent if the application is granted.

From the facts tendered, the delay in filing of the notice of appeal is only a matter of seven days. There is evidence from the first defendant's solicitors that on the very next day after the decision of the senior assistant registrar a letter was sent to the first defendant informing her of the decision and requesting for instructions. This letter did not reach the first defendant until 18 August 1992. On this very same day, communication between the first defendant and her solicitors was finally established by telephone and without further delay, an application for enlargement of time was filed. I find this delay not unreasonable and unjustifiable after taking into consideration that part of the delay was also due to the postal service which, I find, is highly inefficient to deliver a letter some seven days within the same town.

As to the point raised by Miss Sothi relating to the assertion in the affidavit of the first defendant that the first defendant's counsel had already proceeded to file an appeal on 15 August 1992, I accept the explanation of Mr Wong Kim Fatt, counsel for the first defendant, that this is obviously a clerical mistake when all facts in the affidavits filed in support of this application point to the direction that no notice of appeal was filed on 15 August 1992. Further, from the evidence adduced, the first defendant's solicitors only attempted to file a notice of appeal on 22 August 1992 which document was rejected by this court. Therefore, from the aforesaid, I find that there could not have been any notice of appeal being filed by the first defendant's solicitors on 15 August 1992.

I have perused the affidavits so filed by both parties in respect of the O 14 application. In it, in my opinion, contains various issues which warrant a closer consideration, bearing in mind that the judgment so granted by the senior assistant registrar is of a summary nature and that the sum involved is over $\$^1/_2$m together with interest. The claim by the plaintiffs is based on two guarantees executed by the first defendant in favour of the plaintiffs. The consideration for these guarantees was for financial facilities granted to a housing development company. There are various allegations by the first defendant of misrepresentations by the plaintiffs and of wrongful allocation of funds by the plaintiffs, to that as agreed with the first defendant and the failure on the part of the plaintiffs to fulfil certain arrangements.

I find that all these allegations are of a qualitable nature as compared to that of a bare denial, for this appeal to be heard before a judge of the High Court. I once again wish to stress that the judgment given is that of a summary nature where no full hearing involving the examination and cross-examination of witnesses was carried out. In view of this, I find that it is reasonable in the circumstances of this case that the first defendant may succeed in her appeal if time for appealing is extended.

Relating to the question of the degree of prejudice to the would-be respondents, ie the plaintiffs in this case, I find that they are not substan-

tially prejudiced. The plaintiffs' application was for summary judgment and if their case is comprehensive enough they would still succeed at the appeal to the judge-in-chambers which in such cases, act as a rehearing of their O 14 application.

The first defendant had not delayed in filing this application for enlargement of time to file notice of appeal and, from the date of the senior assistant registrar's decision till now, only two months has lapsed. During this period, no further steps have been taken by the plaintiffs in enforcing the judgment order of the senior assistant registrar. If this application is to be granted, an appeal to the judge-in-chambers for the plaintiffs' O 14 application has to be heard in just a few months. In view of the aforesaid, I find that the degree of prejudice against the plaintiffs is very small in this case which can be compensated with costs.

For the reasons as stated by me, this court allows the first defendant an enlargement of time of two days from date of this order to file notice of appeal against the decision of the senior assistant registrar and that the costs of this application be paid by the first defendant to the plaintiffs.

Application allowed.

Reported by Zarinah Marican